



December 12, 2000

Ms. Christine Rothe
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2000-4679

Dear Ms. Rothe:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 142078.

The Lower Colorado River Authority (the "LCRA") received a request from the Save Our Springs Alliance ("SOS") for various specific information pertaining to a proposed waterline, described with specificity in items numbered 1 through 8 of the request. In exhibits marked by you as C, D, E, F, and G, you have submitted for our review the information, or representative samples,¹ that you indicate to be responsive to items 4, 5, and 8 of the request. You assert that this information is excepted from disclosure by sections 552.101, 552.103, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you assert, and we have reviewed the submitted information.

We note at the outset that because you assert no exceptions and make no arguments with reference to the information requested in items 1, 2, 6, and 7 of the request, we assume that the LCRA has released this information to the requestor. *See* Gov't Code §§ 552.301, .302. With regard to the information sought in item number 3 of the request, you state that due to "a misunderstanding concerning the scope of the request, SOS has agreed to allow the LCRA an extension to respond and assert exceptions . . ." As exhibit I, you have provided for our review a letter from the LCRA to the requestor as evidence of an agreement that purports to extend the deadline for the LCRA to assert exceptions to the information requested in item 3.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We note, however, that section 552.301 of the Act dictates the deadline by which a governmental body must assert any exceptions to requested information. *See* Gov't Code § 552.301(b). We do not believe that this deadline, mandated by statute, may be overridden by an agreement between the requestor and the LCRA. However, we call your attention to Open Records Decision No. 663 (1999), which provides for tolling of the statutory 10 business day deadline under certain circumstances.

Before addressing the claimed exceptions to the submitted responsive information and representative samples in exhibits C through G, we note that some of this information is subject to section 552.022 of the Government Code. This provision states in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022 (emphasis added). Exhibit G includes documents that appear to have been filed with a court. To the extent the submitted records are also contained in a public court record, such information is subject to section 552.022(a)(17). Exhibit G also includes contracts between LCRA and property owners which appear to have been executed. We believe that any executed contracts to which LCRA is a party and that are responsive to the request constitute information subject to section 552.022(a)(3). In addition, the spreadsheet document in exhibit C titled "Sunsetpymts.xls" comprises information in an account relating to the receipt or expenditure of public or other funds by the LCRA, and this information is, therefore, also subject to section 552.022(a)(3). We advise that sections 552.103, 552.105, 552.107(1), and 552.111 of the Government Code are discretionary exceptions under the Act which do not constitute "other law" that makes information expressly confidential.² The

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive

responsive information that is subject to section 552.022 may not therefore be withheld under these exceptions. Section 552.101 of the Act, on the other hand, excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that portions of the responsive information are made confidential by a provision of the Public Utility Regulatory Act, specifically section 182.052 of the Utilities Code.³ This provision states in relevant part:

(a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record if the customer requests that the government-operated utility keep the information confidential.

Util. Code § 182.052(a). "Personal information" under section 182.052(a) means an individual's address, telephone number, or social security number. *See* Util. Code § 182.051(4). The information contained in the document titled "Sunsetpymts.xls" includes the address of the customer. You indicate that some of the customers have requested confidentiality for their personal information. You also state:

At this time, the LCRA has yet to receive responses from all of its customers concerning the right to keep their personal information confidential Should any customers indicate a willingness to allow disclosure of this information, the LCRA will promptly disclose such information for those customers

This office construed the predecessor provision to section 182.052 of the Utilities Code in Open Records Decision No. 625 (1994). In that decision, we concluded that the provision requires withholding of a customer's personal information *only if* the customer has already elected confidentiality. *See* Open Records Decision No. 625 at 4-6 (1994). Thus, contrary to your statement quoted above, which implies that the customer's personal information is confidential unless the customer elects to have their personal information released, the LCRA must withhold a customer's personal information *only if* the customer elected to make the information confidential before the LCRA received the present request. Thus, the personal information of customers who did not return the confidentiality election form, or who otherwise did not request that the LCRA maintain as confidential their personal information, is not made confidential by section 182.052. Therefore, this information in the document

attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

³Formerly sections 2 and 4 of article 1446h, Vernon's Texas Civil Statutes. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 166, § 1, 1997 Tex. Gen. Laws 713, 991.

titled "Sunsetpymts.xls" is subject to release. However, for those customers who have timely elected confidentiality, we conclude that the LCRA must redact the customer's address information from the records titled "Sunsetpymts.xls" prior to releasing these records.

As to the information in exhibits C through G to which section 552.022 of the Act does not apply, you assert the applicability of the litigation exception, found at section 552.103 of the Act. Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the LCRA must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You assert that litigation involving the LCRA and the requestor was reasonably anticipated at the time of the request. To demonstrate that litigation is reasonably anticipated, the LCRA must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has found that where a governmental body receives a demand letter from an attorney which threatens suit, litigation may be reasonably anticipated for purposes of section 552.103. Open Records Decision No. 346 at 2 (1982). You have provided as exhibit B a letter from an attorney for the SOS, addressed to the LCRA and dated September 9, 1999, in which the attorney alleges violations of the Endangered Species Act and other law by the LCRA and specifically threatens suit against the LCRA. You also have demonstrated that litigation related to condemnation proceedings and involving the LCRA is pending or reasonably anticipated, in that you have provided as exhibit H twelve original petitions identifying the LCRA as the plaintiff and which have been filed with the court. Thus, as to the first prong of the above-stated test, we believe the LCRA has demonstrated in this instance that litigation was pending or reasonably anticipated at the time the LCRA

received the present request. As to the second prong of the above-stated test, upon careful review of the submitted information, we also agree that the requested information relates to the pending or anticipated litigation. Except as otherwise noted herein, the department may therefore withhold the requested information pursuant to section 552.103 of the Act.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing parties in the pending or anticipated litigation have seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the LCRA must release to the requestor the information that is subject to section 552.022 of the Act, as provided above, except the LCRA must redact from the document in exhibit C titled "Sunsetpymts.xls" the address of those customers who timely elected confidentiality of their personal information. The LCRA may withhold the remaining information pursuant to section 552.103 of the Act, as provided above.

Because we are able to resolve the matter under section 552.022, 552.101, and 552.103 of the Act, we do not address the section 552.105, 552.107, or 552.111 assertions. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 142078

Encl. Submitted documents

cc: Mr. Bill Bunch
Save our Springs Alliance
P.O. Box 684881
Austin, Texas 78768
(w/o enclosures)